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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. FABIAN JOSEPH MARTE, Defendant and Appellant.	H026981 (Santa Clara County Super.Ct.No. CC306744)

A criminal defendant with a prior strike conviction resolved two robbery charges by a plea agreement that cut his possible prison time almost in half, with an agreed sentence of nine years. The court explained that this disposition was over the prosecutor's objection. Before the defendant pleaded guilty, he acknowledged the court's advice that "You will have to make restitution to the victim; [¶] [a]nd a mandatory restitution fund fine of $200 to $10,000; [¶] [a]nd there will be an additional suspended restitution fine." At sentencing, without objection by the defendant, the court imposed a restitution fine of $3,600 as calculated in the probation report pursuant to a formula recommended by the Legislature in Penal Code section 1202.4, subdivision (b)(2).[1] The court imposed a suspended fine in the same amount under section 1202.45 and victim

[1] Unspecified section references are to the Penal Code. Unspecified subdivision references are to section 1202.4.

restitution of $1,326.77. We will conclude, among other things, that the defendant has not demonstrated that imposition of these fines violated the terms of his plea agreement.

PROCEEDINGS

After a preliminary examination, on September 19, 2003, defendant Fabian Marte was charged by information with two counts of second-degree robbery (§§ 211-212.5) with a prior serious felony conviction of rape (§§ 667, 1170.12).

On November 24, 2003, defense counsel announced that defendant was ready to "take the negotiated plea of a mitigated term." The judge clarified that this was the court's offer over the prosecutor's objection. The judge explained that defendant was to plead to everything, and he would received the mitigated term on one count doubled due to the prior strike, with the other count to run concurrent, all enhanced by five years for the serious felony conviction. Responding to the judge's questions, defendant said that he understood the proposed disposition, that he had discussed the case with his attorney, and that no promises had been made to him to get him to change his plea "other than the disposition that" the judge had just explained.

Defendant agreed to waive his rights to trial, to confront and subpoena witnesses, to testify and to remain silent.

The judge further explained that defendant would be sentenced to nine years in prison, though the maximum term could have been 17 years. "There will be a mandatory $10 fine pursuant to . . . 1202.5; [¶] [y]ou will have to make restitution to the victim; [¶] [a]nd a mandatory restitution fund fine of $200 to $10,000; [¶] [a]nd there will be an additional suspended restitution fine if you will be sentenced to prison; [¶] [t]here is a discretionary fine possible of up to $10,000." Defendant acknowledged that he understood. The court did not give defendant a section 1192.5 admonition.[2]

When the court asked if defendant had any questions, defendant pointed out that his rape conviction resulted from aiding and abetting. The court explained that a five-

[2] We quote this admonition in footnote 13 on page 2, *post*.

year enhancement still attached. Defendant pleaded guilty to both robbery charges and admitted the prior serious felony conviction.

The probation report explained that defendant had taken the night bank deposit, amounting to $1,326.77, from two employees of Zumiez, a store in Oakridge Mall. The report recommended, among other things, that the court impose victim restitution of $1,326.77 to Zumiez, a restitution fine of $3,600 under the formula provided in section 1202.4, subdivision (b), and an additional restitution in a like amount to be suspended under section 1202.45. The probation report did not recommend the $10 fine mentioned by the court.

The matter was submitted at sentencing on December 17, 2003, without objection to the probation report. The court again explained, "this was a negotiated disposition based upon the court's offer over the D.A.'s objection." The court sentenced defendant to nine years in prison and imposed all the recommended fines without objection by defendant or his attorney.

THE RESTITUTION FINE STATUTES

We summarize the pertinent parts of section 1202.4, a statute currently containing over 2,900 words.

The current statute mandates judicial imposition of both a restitution fund fine (subd. (a)(3)(A)) and restitution to the crime victim (subd. (a)(3)(B)) whenever a person is convicted of a crime.[3] The trial court shall impose the restitution fine "unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." (Subds. (b), (c).) In the absence of extraordinary reasons, a minimum fine of

[3] The former statutory scheme allowed for making victim restitution payments in lieu of the restitution fine (former Gov. Code, § 13967, subd. (c); Stats. 1986, ch. 1438, § 1, p. 5141; former § 1202.4, subd. (f); Stats. 1994, ch. 1106, § 3, p. 6549) as this court noted in *People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1536, but this provision was eliminated from subdivision (f) effective August 3, 1995. (Stats. 1995, ch. 313, § 5, p. 1755; *People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1534-1535.)

$200[4] is mandatory after a felony conviction (subds. (b)(1), (c), (d)) "even in the absence of a crime victim." (*People v. Hanson* (2000) 23 Cal.4th 355, 362.)[5] The sentencing court has discretion to impose a fine of up to $10,000 in light of all relevant factors.[6] "Express findings by the court as to the factors bearing on the amount of the fine shall not be required. A separate hearing for the fine shall not be required." (Subd. (d).)

A defendant's inability to pay is relevant only to the question of how much over $200 the fine should be. (Subd. (c).)[7] The burden is on the defendant to demonstrate his or her inability to pay. (Subd. (d).)[8]

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[4] The minimum fine, formerly stated in Government Code section 13967, subdivision (a)) was $100 (Stats. 1983, ch. 1092, § 135.2, p. 3998) until it was increased to $200 in 1993 (Stats. 1992, ch. 682, § 4, p. 2922). The upper limit has remained the same.

[5] We note that the California Supreme Court has repeatedly described the minimum restitution fine as mandatory. (*People v. Hanson*, *supra*, 23 Cal.4th at p. 362; *People v. Walker* (1991) 54 Cal.3d 1013, 1027 (*Walker*).) However, presumably because the fine need not be imposed in extraordinary cases and the amount is discretionary, the court has also characterized the fine as a "discretionary sentencing choice" for purposes of the waiver doctrine. (*People v. Tillman* (2000) 22 Cal.4th 300, 303; *People v. Smith* (2001) 24 Cal.4th 849, 853.)

[6] Subdivision (d) provides in part: "the court shall consider any relevant factors including, but not limited to, the defendant's inability to pay, the seriousness and gravity of the offense and the circumstances of its commission, any economic gain derived by the defendant as a result of the crime, the extent to which any other person suffered any losses as a result of the crime, and the number of victims involved in the crime. Those losses may include pecuniary losses to the victim or his or her dependents as well as intangible losses, such as psychological harm caused by the crime." The fine should be "commensurate with the seriousness of the offense." (Subd. (b)(1).)

[7] "[T]he defendant's ability to pay" was briefly a consideration in imposing any fine (former Gov. Code, § 13967, subd. (a); Stats. 1992, ch. 682, § 4, p. 2922), but that provision was eliminated when the bulk of former Government Code section 13967 was incorporated in section 1202.4 in 1994. (Stats. 1994, ch. 1106, §§ 2, 3, pp. 6548-6549; *People v. Barnett* (1998) 17 Cal.4th 1044, 1182, fn. 100.)

[8] While imprisonment may limit a defendant's inability to pay counsel (§ 987.8, subd. (g)(2)(B)), it does not establish an inability to pay a restitution fine. Section 2085.5

(Continued)

Since 1995, the statute has included a recommended formula for calculating the fine. "In setting a felony restitution fine, the court may determine the amount of the fine as the product of two hundred dollars ($200) multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (Subd. (b)(2); Stats. 1995, ch. 313, § 5, p. 1756.)

Since 1996, an "additional restitution fine" duplicating the amount of the restitution fine is mandatory. (§ 1202.45.)[9] This fine is takes effect only if parole is revoked.

CALIFORNIA SUPREME COURT PRECEDENT

In *Walker*, *supra*, 54 Cal.3d 1013, the California Supreme Court resolved a conflict "over the proper means of remedying the erroneous imposition of a restitution fine." (*Id.* at p. 1018.) In that case the defendant agreed to a plea bargain whereby one of two felony charges would be dropped and he would receive a five- year prison sentence. (*Id.* at pp. 1018-1019.) The trial court advised the defendant that the maximum legal penalties were seven years in prison and a fine of up to $10,000. (*Id.* at p. 1019.) The trial court was apparently referring to the discretionary $10,000 penal fine generally

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provides for collecting restitution fines from prison wages. The Director of Corrections is entitled to an administrative fee for this collection. (§ 2085.5, subd. (c).)

[9] Section 1202.45 states: "In every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional restitution fine shall be suspended unless the person's parole is revoked."

The imposition of this fine is not a discretionary sentencing choice. (*People v. Smith*, *supra*, 24 Cal.4th at p. 853.) Accordingly, an error in a parole revocation fine may be raised and corrected on appeal without a prior objection in the trial court. (*Id.* at pp. 853-854.)

available under section 672[10] after any felony conviction for which no other fine was prescribed. (*Walker, supra,* at p. 1019.) The sentencing court in *Walker* did not advise the defendant of the mandatory restitution fine of at least $100 and no more than $10,000. (*Ibid.*) Immediately after the guilty plea, the court sentenced the defendant to five years in prison. A probation report prepared before the plea recommended a $7,000 restitution fine. The court imposed a $5,000 restitution fine without objection by the defendant. (*Ibid.*)

The California Supreme Court explained that two "related but distinct legal principles" were involved. (*Walker*, *supra*, 54 Cal.3d at p. 1020.) One was the "'a judicially declared rule of criminal procedure'" (*id.* at p. 1022) that, before entering a guilty plea, a defendant be judicially advised "of the direct consequences of the plea." (*Id.* at p. 1020.) The court concluded that "[a] possible $10,000 restitution fine constitutes such a direct consequence. Thus, before taking any guilty plea a trial court should advise the defendant of the minimum $100 and maximum $10,000 restitution fine." (*Id.* at p. 1022.) The court further concluded that such an error may be forfeited[11] by the lack of a timely objection. "[W]hen the only error is a failure to advise of the consequences of the plea, the error is waived if not raised at or before sentencing." (*Id.* at p. 1023.) The court found that this error was waived. (*Id.* at p. 1029.)

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[10] Section 672 states: "Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars ($1,000) in cases of misdemeanors or ten thousand dollars ($10,000) in cases of felonies, in addition to the imprisonment prescribed."

[11] *Walker* talked in terms of waiver, but "forfeiture" is technically more correct. *People v. Simon* (2001) 25 Cal.4th 1082 explained at page 1097, footnote 9: "In this context, as in others, the terms 'waiver' and 'forfeiture' long have been used interchangeably. As the United States Supreme Court has explained, however, '[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." [Citations.]' (*United States v. Olano* (1993) 507 U.S. 725, 733.)"

The other legal principle was that "the parties must adhere to the terms of a plea bargain." (*Walker, supra,* 54 Cal.3d at p. 1020.) "The punishment may not significantly exceed that which the parties agreed upon." (*Id.* at p. 1024; cf. § 1192.5.)[12] The court concluded that a restitution fine "qualifies as punishment for this purpose. Accordingly, the restitution fine should generally be considered in plea negotiations." (*Walker*, *supra*, at p. 1024.)

Regarding when a defendant might forfeit a contention that the punishment exceeded the bargain, the court held that, if a defendant was given a section 1192.5 admonition[13] "and the defendant does not ask to withdraw the plea or otherwise object to the sentence, he has waived the right to complain of the sentence later." (*Walker, supra,* 54 Cal.3d at p. 1026.) On the other hand, "[a]bsent compliance with the section 1192.5 procedure, the defendant's constitutional right to the benefit of his bargain is not waived by the mere failure to object at sentencing." (*Id.* at p. 1025.) *Walker* concluded that since the defendant in that case had not received a section 1192.5 advisement, he was able to assert on appeal that "the $5,000 restitution fine was a significant deviation from the negotiated terms of the plea." (*Walker, supra,* at p. 1029.)[14] The remedy for this

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[12] Section 1192.5 states in paragraph two: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea."

[13] Paragraph three of section 1192.5 requires a court to advise a defendant "prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so."

[14] *Walker* does contemplate that insignificant deviations from the plea agreement do not violate it. (*Walker*, *supra*, 54 Cal.3d at p. 1024.) The opinion warned, however, that, "Courts should generally be cautious about deeming nonbargained for punishment to be insignificant." (*Id.* at p. 1027, fn. 3.)

violation was to reduce the restitution fine to the mandatory minimum, then $100, rather than remanding the case for a redetermination of the fine. (*Id.* at pp. 1028-1030.)

Later cases clarify the application of *Walker*. In deciding whether the punishment exceeds the bargain, a court must first establish the terms of the bargain. In companion cases, the California Supreme Court explained: "In *Walker*, the offense to which the defendant had agreed to plead guilty carried a potential seven-year sentence and a $10,000 punitive fine, but under the negotiated plea agreement the defendant was to receive a five-year term of imprisonment and no punitive fine. At the subsequent sentencing hearing, the trial court imposed the agreed-upon five-year sentence but also a substantial ($5,000) restitution fine. [¶] In concluding that the imposition of such a substantial fine constituted a violation of the plea agreement in *Walker*, we implicitly found that the defendant in that case reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed." (*In re Moser* (1993) 6 Cal.4th 342, 356 (*Moser*); *People v. McClellan* (1993) 6 Cal.4th 367, 379-380 (*McClellan*).)

In *Moser*, the court concluded that the parole term was not a subject of the plea agreement. "Based solely upon the record of the plea proceedings, it would appear that the indicated length of the parole term was not a part of the plea agreement, but simply constituted a misadvisement by the trial court. As set forth above, prior to accepting petitioner's plea of guilty, the trial court recited on the record the terms of the parties' plea agreement, noting that petitioner had agreed to plead guilty to the lesser charge of second degree murder in exchange for the People's agreement to forego a trial on the first degree murder charge and to dismiss the firearm-use allegation. The trial court inquired of petitioner whether the court's statement was an accurate recitation of the plea agreement, and he responded affirmatively. Nothing in the record indicates that the length of the parole term, improperly described by the trial court, was an element of the parties' plea negotiations and resulting agreement so as to render imposition of the lifetime period of parole mandated by statute a violation of the plea agreement." (*Moser*, *supra*, 6 Cal.4th at p. 356.) The court noted that lifetime parole is mandatory for those

convicted of second degree murder and accordingly would not be subject to negotiation. "[I]f (as appears from the record) the subject of parole was not encompassed by the parties' plea negotiations, imposition of the statutorily mandated term of parole would not constitute a violation of the parties' plea agreement." (*Id.* at p. 357.) The court remanded the case for further proceedings on the question "whether the length of petitioner's term of parole was an element of the plea negotiations." (*Id.* at p. 358.)

In *McClellan*, the court noted that "[t]he statutory requirement of sex offender registration was not mentioned by the parties or by the court" when the trial court recited the plea agreement. (*McClellan*, *supra*, 6 Cal.4th at p. 379.) Further, the defendant did not argue that registration was a subject of the plea negotiations. (*Ibid.*) Registration is mandatory and "not a permissible subject of plea agreement negotiation." (*Id.* at p. 380.) "Because the registration requirement is statutorily mandated for every person convicted of assault with intent to commit rape, that requirement was an inherent incident of defendant's decision to plead guilty to that offense and was not added 'after' the plea agreement was reached." (*Ibid.*) It is not a violation of a plea agreement if "a statutorily mandated consequence of a guilty plea is not embodied specifically within the terms of a plea agreement." (*Id.* at p. 381.)

DID THE FINES VIOLATE DEFENDANT'S PLEA BARGAIN?

On appeal defendant relies on *Walker* in arguing that the restitution and parole revocation fines "were never a part of the plea bargain" and "the imposition of these restitution fines constituted punishment in excess of that contained in the terms of the plea bargain, and thereby violated that agreement." Defendant does not object to the restitution award to the victim. We believe "[t]his argument rests upon an erroneous, overbroad reading of *Walker*." (*Moser*, *supra*, 6 Cal.4th 342, 356.)

Walker held that "[t]he court should always admonish the defendant of the statutory minimum $100 and maximum $10,000 restitution fine as one of the consequences of *any* guilty plea, and should give the section 1192.5 admonition whenever required by that statute." (*Walker*, *supra*, 54 Cal.3d 1013, 1030.) *Walker* recommended that "[c]ourts and the parties should take care to consider restitution fines

during the plea negotiations." (*Ibid*.) The court "implicitly found that the defendant *in that case* reasonably could have understood the negotiated plea agreement to signify that no substantial fine would be imposed." (*In re Moser*, *supra*, 6 Cal.4th at p. 356; *McClellan*, *supra*, 6 Cal.4th at pp. 379-380; italics added.)[15]

But *Walker* should not be understood as finding that the restitution fine has been and will be the subject of plea negotiations in every criminal case. "The parties to a plea agreement are free to make any lawful bargain they choose." (*People v. Buttram* (2003) 30 Cal.4th 773, 785.) *Walker* does not prohibit criminal defendants from striking whatever bargains appear to be in their best interests, including leaving the imposition of fines to the discretion of the sentencing court.

The First District Court of Appeal (Div. Five) recognized this limitation in *People v. DeFilippis* (1992) 9 Cal.App.4th 1876, where the court held "that if a plea bargain does not specify punishment and the defendant is not advised of an obligatory restitution fine, the imposition of a restitution fine above the statutory minimum violates only the right to be advised as to the direct consequences of the plea, not the plea bargain itself, and thus the error is waived if not raised at or before sentencing." (*Id.* at p. 1878.) In that case the defendant entered a plea bargain that "did not specify any punishment." (*Ibid.*) On appeal he complained about the trial court's imposition of a restitution fine of $5,000. The appellate court concluded, "Absent any agreement as to punishment, the imposition of the restitution fine did not violate the plea bargain" and the waiver rule applied. (*Id.* at p. 1879.)

Defendant asserts, in reliance on *Walker*, that "because the precise amount of a restitution fine is discretionary depending on the facts of the case, a defendant can reasonably understand that a plea agreement, which makes no mention of the fine, signifies that the court will not impose a substantial fine." The plea bargain "did not

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[15] We recently reached the same conclusions in *People v. Dickerson* (Oct. 6, 2004, H026484) ___ Cal.App.4th ___ [p. 10].

include the imposition of a restitution fine." The Attorney General responds that the transcript of the change of plea hearing reflects that "the fines were clearly included as material terms of" the plea agreement.

In this case the plea agreement was between the court and the defendant.[16] The court did not recite that there was any express agreement that either no restitution fine would be imposed, the minimum fine would be imposed, or a fine pursuant to the statutory formula would be imposed. In our view, this simply shows that the parties left unresolved the imposition or amount of any fine. "[I]t would appear that [this topic] was not a part of the plea agreement." (*Moser*, *supra*, 6 Cal.4th 342, 356.) Indeed, when asked by the court, defendant denied that any promises had been made other than fixing the prison term. The court's omission of a term cannot transform it "into a term of the parties' plea agreement." (*McClellan*, *supra*, 6 Cal.4th 367, 379; italics omitted; cf. *People v. Lopez* (1998) 66 Cal.App.4th 615, 636 [no evidence that omission of standard gang probation condition was part of the plea bargain].) This omission does not imply that there was an agreement on no fine or on a minimum fine. Instead, this omission is among the circumstances suggesting to us that defendant in this case implicitly agreed to leave the imposition and amount of restitution fines to the sentencing court's discretion.

We find further confirmation in the fact that defendant acknowledged before entering his pleas "You will have to make restitution to the victim; [¶] [a]nd a mandatory

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[16] It is an interesting question, which we need not decide, whether a section 1192.5 admonition or something similar should be given after a court offer or indicated sentence. (*In re Jermaine B.* (1999) 69 Cal.App.4th 634, 640 ["the principles underlying . . . section 1192.5 are applicable to plea bargain situations similar to guilty pleas"].) Section 1192.5 talks in terms of a plea being accepted by the prosecutor and approved by the court. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1181-1182 [factual basis requirement applies by its terms only to conditional, negotiated pleas].) A court's sentence indication must be distinguished from plea negotiations, in which courts should not engage. (*People v. Superior Court (Felmann)* (1976) 59 Cal.App.3d 270, 276; *People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 915-916; *People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1271.)

restitution fund fine of $200 to $10,000; [¶] [a]nd there will be an additional suspended restitution fine if you will be sentenced to prison." If the minimum fine was a term of his plea bargain, presumably defendant or his attorney would have questioned this judicial advice.

The probation report also notified defendant that he was facing a restitution fine of $3,600 under the formula recommended in section 1202.4 and a like amount under section 1202.45. (*People v. Phillips* (1994) 25 Cal.App.4th 62, 74-75 [probation report notified the defendant that reimbursement of attorney fees was sought].) At sentencing neither defendant nor his attorney objected to this recommendation or to the court's imposition of these fines. If these substantial restitution fines violated defendant's plea bargain, defendant or his attorney could be expected to have so objected at sentencing. (*Id.* at p. 75.) In this context we mention the lack of objection, not to establish forfeiture or waiver, but to demonstrate that nobody in the trial court seemed to think that the imposition of a $3,600 restitution fine violated the terms of the bargain.

Unlike *People v. DeFilippis*, *supra*, 9 Cal.App.4th 1876, this is not a case of an open plea where the punishment was entirely unspecified by the plea agreement. Nor is this a case where the agreement was that the prison sentence would be imposed within an agreed range. (Compare *People v. Buttram*, *supra*, 30 Cal.4th at pp. 777-778.) However, all the circumstances indicate that defendant's concern in entering a plea agreement was to limit his time in prison. *Walker* did not require defendant and the court to negotiate—whether to resolution or impasse—regarding the imposition or amount of restitution fines. It appears that defendant here implicitly agreed that additional punishment in the form of statutory fines and fees would be left to the discretion of the sentencing court. Accordingly, we conclude that defendant has not established that the sentencing court's imposition of restitution fines pursuant to the statutory formula violated his plea agreement.

DISPOSITION

The judgment is affirmed.

Walsh, J.*

WE CONCUR:

Premo, Acting P.J.

Bamattre-Manoukian, J.

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.